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Supreme Court of the United States

OCTOBER TERM, 1942
No. 1020

NORTH KANSAS CITY DEVELOPMENT COMPANY, NORTH KANSAS CITY BRIDGE AND RAILROAD COMPANY and NORTH KANSAS CITY LAND AND IMPROVEMENT ASSOCIATION,

Petitioners,

against

CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY BRIEF FOR PETITIONERS

The fundamental error underlying the respondent's argument is the wholly false assumption that the Circuit Court of Appeals reviewed the facts and affirmed the findings of the District Court. From that false conclusion the respondent has argued that all the questions (save the question as to jurisdiction) sought to be raised are not presented by the record. As is about to be shown (p. 7 *post*) the Circuit Court found it unnecessary to exercise the power under the Civil Procedure Rules to review the findings because the Court assumed the basic facts in favor of the

petitioners, but nevertheless held as a matter of law that the Burlington had the right to condemn.

The respondent's brief contains an elaborate recital of facts which have not the slightest bearing on the legal question presented—the right to condemn. No answer need be made here to the vicious attack (respondent's brief pp. 5, 11) upon the late VanSweringens and their "New York bankers" and the references to "side agreements" between other parties who purchased stock of the petitioners long before the institution of this condemnation. All these matters have not the slightest relevance here. The facts are as stated at the top of page 14 of the petition where it appears that the stock of these companies constitutes security for the bonds of Alleghany Corporation which are widely held by the public and dealt in on the New York Stock Exchange.* How, for example, can the right to condemn the tracks and rights of way depend on whether the legal fee charged for preparing the application of the Bridge Company (Respondents Brief p. 5) before the Interstate Commerce Commission was too high or whether the fee included other matters (R. 1527)? Has all this any more materiality than the fact that the Burlington has assets valued at hundreds of millions of dollars or than an inquiry as to whether its bankers are "New York bankers" or reside in Chicago or St. Paul? The purpose of this type of attack is, however, obvious—it is an attempt to create prejudice and to divert attention from the unconscionable conduct of the Burlington in seeking to condemn the properties despite the fact that for over forty years it has owned one-third of the stock of the companies, participated actively in the construction and operation of the very tracks now sought to be condemned, and under oath reported for years

* The so-called "New York bankers" are Trust Companies which are Trustees under the three Alleghany indentures whose sole interest is to protect the security for the bonds issued thereunder.

to the Interstate Commerce Commission that it was operating the tracks of the Bridge Company under lease.*

Upon the argument in the Circuit Court of Appeals, the counsel for Burlington frankly admitted that until 1937 the Burlington believed the Bridge Company to be a bona fide Railroad Company fully possessed of charter rights, and that it was only after the application was filed by the Bridge Company with the State Public Service Commission to determine the manner of crossing the Burlington tracks that counsel sought a way to defeat the application and then "discovered" that the Bridge Company's charter had been forfeited (See Petition, p. 14). Manifestly, this "discovery", even were it well founded, does not alter the *fact* that there were tracks and rights of way which for decades were devoted to a public use, and this with the knowledge and indeed active cooperation of the Burlington. And yet the Burlington has the temerity to argue that these properties in fact were not so devoted!

The argument that the Bridge Company whose tracks were operated under lease by the Burlington did not own any cars, etc., is also wholly immaterial, for the law is well settled in Missouri that where tracks and rights of way are devoted to a public use, the fact that the company owns no equipment and the tracks are operated over by others is wholly immaterial.

> *State ex rel. Hammer* v. *Wiggins Ferry Co.*, 208 Mo. 622;
> *Idalia Realty etc. Co.* v. *Norman's Southeastern Ry. Co.*, Mo. App., 219 S.W. 923.

So, too, the Burlington presents an elaborate argument as to why the pending application of the Bridge Company before the Interstate Commerce Commission for a certificate of convenience and necessity ought not to be granted, and an argument based upon the insolvency of the Bridge

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* See for example photostat of report at R. 517.

Company. Obviously, these arguments are wholly irrelevant but they do show the fear of the Burlington that the certificate will be granted and that by the building of the crossing over the Burlington tracks in the manner already approved by the State Public Service Commission, the Bridge Company will better its financial condition and thus end the Burlington monopoly.

The contention that the defense of estoppel has been waived by "judicial admission" is on a par with some of the other statements of what the record contains. At page 660 of the Record the witness was asked as to negotiations with respect to the possible purchase of the stock of the petitioners owned by the prior owners. The testimony was objected to and referring, of course, to this particular testimony trial counsel for the petitioners stated that the question of estoppel was involved but not an estoppel against the railroad company. Whatever was meant by the statement, certainly the entire defense of estoppel was not intended to be waived by this casual use of that word, nor was there any such finding of waiver below.

The petition for the writ sets forth questions presented and the reasons with respect to each why the petition should be granted. Brief reply will be made to the opposing arguments of the respondents.

I. As to the reconsideration of Madisonville Co. v. St. Bernard Mining Co., 196 U. S. 239.

The fact that the decision of this case was followed in subsequent cases, in some of which even Mr. Justice Holmes concurred, is, of course, no answer to the petition. Obviously, Mr. Justice Holmes did not find it necessary, having been in the minority in the *Madisonville* case, to do other than abide by the decision of the majority in later cases. The fact that the decision was written forty years ago is also of no moment. *Swift* v. *Tyson,* 16 Pet. 1, was the law

for nearly a hundred years, and *Haddock* v. *Haddock*, 201 U. S. 562, for thirty-eight years.* The question is whether the decision is sound and whether there should not be a reconsideration of the important relation between the State and Federal governments in condemnation proceedings under State Statutes.

Specifically, petitioners urge that there should be further consideration of the question as to whether the provision of the State Statute that the proceeding must be brought in the Circuit Court of the County where the land lies (Petition, footnote p. 16), does not expressly make the venue a part of the delegated right to condemn. The action is to condemn real estate—a proceeding in rem in Missouri—and the principle that venue is no part of the right of a *transitory cause of action* has no application. (See, *Tennessee Coal Co.* v. *George*, 233 U. S. 354, and *Texas Pipe Line Co.* v. *Ware*, 15 F. (2d) 171.) It should be pointed out that in his dissenting opinion in *Burford* v. *Sun Oil Co.* (May 24, 1943), Mr. Justice Frankfurter based his dissent, amongst other reasons, upon the fact that the Texas statute there involved did not name the specific court in which the suit was to be brought, and he also made reference to the case of *Texas Pipe Line Co.* v. *Ware*, just referred to. The importance of the question of jurisdiction in the light of these cases warrants a reconsideration of the whole subject.

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* *Blackstone* v *Miller*, 188 U. S. 189 (1903) was overruled in *Farmers Loan Company* v. *Minnesota*, 280 U. S. 204, 209 (1930).

Adkins v. *Children's Hospital*, 261 U. S. 525 (1923) was overruled in *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379 (1937).

Wachovia Trust Company v. *Doughton*, 272 U. S. 567 (1926) was overruled in *Graves* v. *Schmidlapp*, 315 U. S. 657 (1942).

A multitude of other examples can be found in the well known dissenting opinion of Mr. Justice Brandeis in *Burnet* v. *Coronado Oil and Gas Co.*, 285 U. S. 405, 412, 413.

II. As to appropriate forum.

Since the petition was filed in this case, this Court decided *Burford* v. *Sun Oil Company* on May 24, 1943, and on the same day granted the petition for certiorari in No. 923, *Meredith* v. *City of Winter Haven*, 134 F. (2d) 202—referred to in the footnotes at pages 20 and 24 of the petition herein.

In the *Meredith* case, the jurisdiction was founded on diversity and a declaratory judgment was sought that plaintiffs were entitled to interest upon the redemption of certain municipal bonds. The Circuit Court of Appeals dismissed the action on the ground that it involved questions of state law which were not clear. One of the grounds for the petition for certiorari in this Court was that the Court committed error in dismissing the cause for that reason. It is submitted that, irrespective of any other reasons assigned in the present case, it would be appropriate if the writ were granted so that this case could be heard with the *Meredith* case and the whole question as to the scope of the principle laid down in the *Burford* case and the earlier cases set forth at page 20 of the petition might be determined with respect to cases both at law and in equity where jurisdiction is based on diversity and the State law is not clear or settled.

The respondent does not question any of the argument of the petition with respect to the desirability of having undecided State questions in condemnation decided by the State Courts before the Federal Court speculates as to what the final decision of the State Court may be. The argument seems to be that the ground which is urged in support of the application is incorrectly stated and that the questions have been decided. It is here that the respondent repeatedly makes the false assumption that the findings of the District Court were reviewed and approved in the Circuit Courts of Appeals. That this is not the fact will now be shown.

The Circuit Court of Appeals expressly refrained from approving the findings of the District Court upon which the respondent relies.

Preliminarily, it should be pointed out that inasmuch as the Rules of Civil Procedure are applicable to appeals in condemnation cases (Rule 81a, subdivision 7), the Circuit Court of Appeals has the power under Rule 52a to review the findings of fact in law cases tried without a jury (as was the issue of the right to condemn in the present case) to the same extent as in suits in equity. The scope of such a review is thus stated by the Circuit Court of Appeals of the Eighth Circuit itself in *Aetna Life Insurance Company* v. *Kapler,* 116 F. (2d) 1, 5:

> "The findings of fact of the court below to the extent that they are unsupported by substantial evidence, or are clearly against the weight of the evidence, or were induced by an erroneous view of the law, are not binding upon this court."

The issue on the preliminary trial of the right to condemn was whether the tracks and rights of way were being devoted to the same public use as that to which the condemnor sought to put them. This question in turn involved the question of the status of the alleged user.

The basic findings of fact of the *District Court* were these: (1) That the tracks and rights of way sought to be condemned belonged to the Development Company (R. 121). (2) That the charter of the Bridge Company had expired before the tracks had been built. (3) That neither the Bridge Company nor the Development Company ever devoted any of the rights of way to public use. In addition, before the entry of judgment the District Court refused to find that the Bridge Company was a union depot company the charter of which was not subject to the self-executing forfeiture provisions of the Missouri statutes. Obviously, if the Circuit Court had affirmed the findings of the District Court that the tracks and rights of way belonged to the Development Company, and that in fact they were not

being devoted to a public use by the petitioners, that would have been the end of the case because the question of whether the present and proposed use were the same could not arise. However, the opinion of the Circuit Court makes it entirely clear that it did not review and affirm these basic findings, but assumed their incorrectness and affirmed the judgment of the District Court because, while the property in fact had been devoted to a public use, it had not been *lawfully* devoted. The question (which, amongst others, is sought to be reviewed here) is whether under Missouri law the power has been delegated to condemn property for the same use as that to which it is already being devoted for the sole reason that the user's charter has expired or the construction was ultra vires.

That the Circuit Court did not approve the findings appears clearly from its opinion.* It first says (R. 2016):

> "The test of the Burlington's right to make the condemnation in the present situation, under the statutes and the decisions cited, was, therefore, whether or not the property already was being devoted to railroad use *by another corporation which had the power and the right, under the statutes and under its articles, to engage in such operations.*"

On the question of the title to the tracks and rights of way, the Court says (R. 2018):

> "The trial court found that the tracks had in fact been constructed by and were the property of the Development Company and not the Bridge Company, but it did not rest its decision as to the Burlington's right to condemn upon this narrow ground. *Further discussion of the issue and of the evidence in connection with it is unnecessary here,* because, under the other circumstances in the record, even if the tracks were owned and maintained by the Bridge Company, that fact would not be sufficient to preclude the Burlington from condemning them,

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* Italics supplied in following quotations.

> under section 1512 of the statutes. On the undisputed evidence, the Bridge Company had forfeited any power, which it could possibly claim to have had under its charter, to construct, operate and make a *valid* dedication of the property for public railroad use, and hence the facilities were not exempt from condemnation."

Finally, in discussing the effect of forfeiture of the charter and ultra vires, the Court says (R. 2019):

> "Since the corporation in such a situation is ipso facto stripped of the power to engage in any of its uncompleted charter undertakings, it necessarily follows that any property which it thereafter attempts to acquire for the purpose of carrying on such other operation cannot be regarded as being *legally* dedicated and devoted to an authorized railroad use which will prevent it and any facilities constructed upon it from being subject to condemnation by another railroad company for a similar use."

Thus, the Circuit Court plainly found or assumed that the tracks and rights of way were *in fact* devoted to a public use, but held that they were not being devoted to such public use by a corporation which met the test that the Court laid down—namely, by a corporation which had the power and the right under the statutes and under its articles to engage in such operations. The Circuit Court further held that even if the Bridge Company was a union depot company, its charter was forfeited because the provisions of the Missouri Revised Statutes were applicable to such a corporation.

Because of all of these conclusions, the Court held that under Section 1512 of the Missouri Revised Statutes (1930)*, the petitioners could not resist condemnation although the present and proposed use in fact were the same. That the Court was not attempting to review the findings or approve them further appears from its judg-

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* Set forth at p. 13 of the petition.

ment (R. 2037) which provides that the judgment of the District Court "adjudicating the right of the Chicago, Burlington and Quincy Railroad Company to condemn be and is hereby affirmed *on the grounds* and to the extent stated in the opinion of this Court this day filed herein."

In view of the foregoing, it is idle for the Burlington to argue that the Court reviewed and affirmed the findings of the District Court, and that neither the Bridge Company nor the Development Company in fact ever devoted the property to a public use. *In view of the foregoing, there is no basis for the argument that the questions are not presented as framed in the petition.* As appears in the petition, these questions have never been decided in Missouri and the argument is that in the first instance they should be decided by the State Courts.

The argument of respondent that the questions of State law presented by the petition have already been decided by the Supreme Court of Missouri and that, therefore, the Federal Court need not prophecy as to State law, finds no support whatever in the two cases relied on. One of them, *Kansas & Texas Railway Co.* v. *Northwestern Coal and Mining Company,* 161 Mo. 288, has already been discussed at pages 31, 34 and 36 of the petition. The other case cited in support of the contention that the court has construed Section 1512 R. S. Mo. 1939 contrary to the contentions of the petitioners here is *St. Louis H. & K. C. Ry. Co.* v. *Hannibal Union Depot Co.,* 125 Mo. 82. In that case a railroad company sought to condemn a strip of land belonging to a union depot company and the defendant claimed that the property being devoted to one public use could not be taken and applied to another inconsistent use. The court simply found that it could be so taken except where the new use would interfere with the prior use and found as a fact that the taking of the property would not interfere with the operation of the union depot company. The court said:

> "The power to appropriate a part of defendant's land for plaintiff's railroad is necessarily implied

> from the powers conferred generally, unless to do so will materially interfere with the uses of the union depot, for which it was acquired and is held."

This is, of course, not a holding that there has been any delegation of power to a railroad company to take property for the *same use* to which it is being devoted solely because of forfeiture or ultra vires, and *that* is the question which is presented by the petition and discussed at page 30 of the petitioners' brief. The question is one which has not been decided by the Supreme Court of Missouri.

The foregoing discussion disposes of the other objections which the respondent makes to the granting of the petition. Just because the Circuit Court erred on the law and because of such errors failed to review the findings, the prayer of the petition is that if the cause is not wholly dismissed, it should be remanded to the Circuit Court to decide the questions left undetermined (Petition, p. 28).

III. As to the jurisdiction of the Circuit Court to entertain the appeal from the District Court.

The respondents moved in the Circuit Court to dismiss the appeal from the District Court upon the ground that the Bridge Company should have appealed from the judgment adjudicating the right to condemn (R. 139), and that having failed to do so the appeal from the final judgment was too late. The motion was denied in the Circuit Court of Appeals (R. 2027, 2036). The respondents now renew its motion to dismiss the appeal and urge that neither the Circuit Court nor this Court has jurisdiction to entertain "an appeal by the Bridge Company" (Resp. Brief p. 28).

It is to be noted that the Burlington has not filed a cross-petition for certiorari on the ground that the Circuit Court erred in affirming the judgment of the District Court and in not dismissing the appeal. It would appear, therefore, that the question as to whether the Circuit Court had jurisdiction to entertain the appeal can only arise after the peti-

tion of the Bridge Company and the Development Company for certiorari is granted, at which time the Court would have jurisdiction of the entire cause and *can determine first whether the District Court had jurisdiction,* and only if it does so determine then whether the Circuit Court had jurisdiction to entertain the appeal. The question whether the appeal from the District Court was timely—whether the judgment adjudicating the right to condemn was "final"—cannot be argued *in extenso* in this reply brief, but the following should be pointed out in support of the conclusion of the Circuit Court:

The basis of the Burlington's argument is that the earlier judgment terminated the Bridge Company's corporate existence and that therefore the Bridge Company could not thereafter participate in the case and appeal from the later judgment as a final judgment. The record shows, however, that pursuant to stipulation there was a trial as to the right to condemn (R. 83, 85), and that that sole issue was tried resulting in a judgment (R. 130) adjudicating that the plaintiff did have the right to condemn. In determining that sole issue, the Court considered evidence as to the ownership of the properties as relevant to the question as to whether they were already being used for a public purpose. There was, however, no *adjudication* other than on the question as to the right to condemn and an appeal from a judgment on the question as to the right to condemn does not lie.

> *Luxton* v. *Bridge Company,* 147 U. S. 337;
> *Southern Ry. Co.* v. *Postal Telegraph & Cable Co.,* 93 Fed. 393, affd. 179 U. S. 641.

The record shows that the Bridge Company participated without objection from the Court or the Burlington in all the proceedings following the earlier or "interlocutory judgment".

1. The corporate defendants, including the Bridge Company, moved (R. 142) to set aside the earlier judgment,

which motion of course could be made at any time before final judgment (*Blythe* v. *Hinckley,* 84 F. 228, 229).

2. The Burlington and the defendants, including the Bridge Company, stipulated that the question of damages, of the ownership of the various tracks, and of the division of the damages between the defendants should be tried after the trial on the right to condemn, and that no "final judgment" should be entered until after the trial of those issues (R. 147-8, 158). The stipulation executed after the earlier judgment referred to the prospective entry of a "final judgment" (R. 148).

3. The Bridge Company appeared at the trial on the issue of damages (R. 1349) and made requests to charge (R. 977-979).

4. In connection with the trial on the ownership of the properties and the division of the damages, the Bridge Company requested the Court to make the same findings which it had sought unsuccessfully to have it make at the time of the interlocutory judgment (R. 156).

5. The final judgment itself contained numerous recitals describing the earlier judgment as an interlocutory one (R. 152, 153).

Thus, it appears that all of the parties and the Court treated the earlier judgment as interlocutory only and believed that the Bridge Company had an interest in the cause until the final judgment was entered. In view of this situation the Circuit Court of Appeals applied the principle laid down by this Court in *La Bourgogne,* 210 U. S. 95 at 113. In that case this Court said that:

> "If the Court below has treated a decree as interlocutory and there is doubt on the subject, that doubt should be resolved in favor of the correctness of the conceptions of the lower court."

The cases cited by the Burlington in support of the claim that the earlier judgment was final have no application here. They all involve the well established rule that.

> " 'an adjudication final in its nature as to matters distinct from the general subject of the litigation, like a claim to property presented by intervening petition in a receivership proceeding, has been treated as final so as to authorize an appeal without awaiting the termination of the general litigation below.' See *Collins* v. *Miller,* 252 U. S. 364, at 370-1."

Finally, it should be pointed out that the finality of a decree must be determined from what is done on the face thereof as stated by this Court in *City of Paducah* v. *East Tennessee Tel. Co.,* 229 U. S. 476, at 480. The earlier judgment here merely adjudicated the right to condemn and appointed commissioners. An appeal from such a judgment, as shown above, would have been dismissed, and the reasons and findings upon which that judgment was based would not have sustained the appeal, because an appeal must be taken from what is adjudicated and not from the reasons or findings upon which the adjudication is based.

It is submitted, therefore, that the decision of the Circuit Court of Appeals denying the motion to dismiss the appeal to that Court was entirely correct, and that in any event the question does not arise unless and until the writ of certiorari is granted so that the whole record can be here for determination as to whether the District Court had jurisdiction and, if it did, whether the appeal was timely.

The petition for the writ should be granted.

Respectfully submitted,

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